Exhibit 9

ENT OF HEALTH AND HUMAN SERVICES
Food and Drug Administration
NCY: Food and Drug Administration.
21 CFR Part 60
tent Term Restoration Regulations

[Docket No. 89N-0169]
RIN 0905-AD16

56 FR 5784

February 13, 1991

n (FDA) is proposing to amend its patent term restoration regulations to
of the Generic Animal Drug and Patent Term Restoration Act (Pub. L.
gulations address patent term restoration, also known as patent term
g products (including biologics and antibiotics), medical devices, food
under the Federal Food, Drug, and Cosmetic Act (the act) and the
rule would expand the scope of the regulations to include patents

proposes that any final rule that may be issued based upon this
te of publication of the final rule in the Federal Register.

nagement Branch (HFA-305), Food and Drug Administration, Rm.

y E. Pirt, Office of Health Affairs (HFY-20), Food and Drug
857, 301-443-1382.

the Generic Animal Drug and Patent Term Restoration Act (the
ded the Federal Food, Drug, and Cosmetic Act (the act) *(21*
g applications (ANADA's). Title II of the Animal Drug Act
C. 156 to include patents claiming certain animal drug

suance. A patent does not permit an inventor to make, use, or
ventor to prevent others from making, selling, or using the
some products, such as drugs and medical devices, to be
arketed. For these products, patent time may be lost

t Term Restoration Act (Pub. L. 98-417) (the PTR Act)
storation to patent holders whose patents claimed human

drug products (including biologics and antibiotics), medical devices, food additives, or color additives. Basically, patent holders could add as much as 5 years to their patent terms to compensate for the time elapsed during regulatory review. In no case, however, could the effective patent life for the product (the time between marketing approval and the expiration of the patent term) be extended to exceed 14 years.

The PTR Act's provisions, however, did not encompass animal drug products. Consequently, several bills were introduced during the 99th and 100th Congresses to extend patent term restoration to animal drug products. The Animal Drug Act (Pub. L. 100-670) achieved this goal in November 1988 by amending the existing patent term restoration provisions at *35 U.S.C. 156* to include animal drug products and biologics.

FDA, the U.S. Patent and Trademark Office (PTO), and the U.S. Department of Agriculture (USDA) share responsibility for implementing the patent term restoration provisions. PTO has primary responsibility over the program. PTO accepts applications, determines whether a patent is eligible for patent term extension, and, if appropriate, issues a certificate of extension. FDA assists PTO in its eligibility determination for products regulated under the act and determines the patented product's regulatory review period, which is the basis of any patent term extension. If necessary, FDA also hold informal hearings to determine whether the marketing applicant acted with due diligence during the review period.

USDA has patent term restoration authority similar to FDA's. USDA determines regulatory review periods relating to products approved under the Virus-Serum-Toxin Act and is authorized to hold hearings to determine whether applicants acted with due diligence.

The proposed regulation set forth in this document expands the scope of the existing patent term restoration regulations at 21 CFR part 60 to encompass animal drug products regulated under the act. The proposal also makes several technical and editorial changes to the existing regulations.

II. Provisions of This Proposal

A. Scope

FDA proposes to amend 21 CFR 60.1(a) to add animal drug products to the list of products for which patent term restoration is available. The proposal also adds to the text the "Public Health Service Act" *(42 U.S.C. 262)* as an additional regulatory authority.

B. Definitions

The agency proposes to amend several definitions in 21 CFR 60.3 to include animal drug products.

Active ingredient (21 CFR 60.3(b)(2)) would be redefined as any component that is intended to "furnish pharmacological activity or other direct effects in the diagnosis, cure, mitigation, treatment, or prevention of disease, or to affect the structure or any function of the body of man or of animals."

Clinical investigation or study (21 CFR 60.3(b)(5)) would be amended to remove the adjective "human" from the existing regulation. This change is necessary since clinical studies on animal drug products do not involve human subjects.

The definitions of marketing applicant at 21 CFR 60.3(b)(11) and Marketing applications at 21 CFR 60.3(b)(12) would be revised to include applications for FDA premarket approval submitted under section 512 of the act *(21 U.S.C. 360b)*.

The definition of "product" at 21 CFR 60.3(b)(14) would be revised to include animal drug products.

The proposed rule also contains a new § 60.3(b)(16) defining "animal drug product." The definition excludes products that are primarily manufactured using biotechnology, as provided in Public Law 100-670.

C. Eligibility Assistance

FDA proposes to amend 21 CFR 60.10 by adding new paragraph (a)(3) to provide that, upon written request from PTO, the agency will assist PTO in determining whether a patent related to an animal drug product is eligible for commercial marketing or use of the animal drug product is the first permitted commercial marketing or use of the drug under the provision of law under which the regulatory review period occurred. If permission was for commercial marketing or use in food-producing animals, FDA will notify PTO whether the permission for use in food-producing animals is the first permitted commercial marketing or use of the drug for administration to a food-producing animal under the provision of law under which such regulatory review period occurred. This proposal implement *35 U.S.C. 156*(a)(5)(C), which enables patent holders to extend the term of a patent whose claims pertain to a food-producing animal use, notwithstanding previous approval of animal drug products containing the same active ingredient for use in nonfood-producing animals, provided that the patent was not extended on the basis of a use in nonfood-producing animals. This proposal also would amend 21 CFR 60.10(a)(3) by redesignating it as 21 CFR 60.10(a)(4) and revising it to indicate that the application for patent extension for an animal drug is to be filed within 60 days of the first approval for marketing or use, or of the first approval by FDA for administration to food-producing animals, whichever is applicable, and to accommodate the proposed amendment discussed above.

FDA also proposes in 21 CFR 60.10 to amend paragraph (a)(2) to emphasize its applicability to human drug products, food additives, color additives, and medical devices, and to redesignate existing paragraph (a)(4) as new paragraph (a)(5) to accomodate the proposed amendments discussed above.

D. Regulatory Review Period Determinations

Proposed paragraphs (d) and (e) in 21 CFR 60.22 incorporate the statutory definition *(35 U.S.C. 156*(g)(4)) of an animal drug product's regulatory review period. The regulatory review period consists of the sum of the lengths of a testing phase and an approval phase. Proposed § 60.22(d) defines the testing phase for an animal drug as the period beginning on the date when the marketing applicant began a major health or environmental effects test or the effective date for a notice of claimed investigational exemption for a new animal drug (INAD), whichever is earlier, and ending when the marketing applicant initially submitted a new animal drug application (**NADA**) . The approval phase is the time between initial submission of the **NADA** and its approval.

FDA believes that the date on which the agency acknowledges the filing of an INAD should constitute the "effective date" for an INAD. The date on which a **NADA** will be considered to have been initially submitted with respect to the animal drug product under section 512(b) of the act will be the date of FDA's official acknowledgment letter assigning a number to the **NADA.** FDA intends to adhere to current agency policy regarding **NADA** approval dates. In brief, the approval date for a **NADA** depends upon the type of new animal drug product. If the product is a dosage form drug, i.e., tablet, capsule, or soluble powder, or a Category I Type A medicated article that is not to be mixed with a Category II Type A medicated article, the **NADA** is approved when FDA sends a letter to the marketing applicant notifying it of the approval. If the product is a Category II Type A medicated article, approval is effective upon publication of the notice of approval in the Federal Register.

The regulatory review period for animal drugs, like that for food and color additives, can begin when a major health or environmental effects test is begun. 21 CFR 60.22(b)(1) defines a "major health or environmental effects test". Rather than repeat this definition in a separate section corresponding to an animal drug product's regulatory review period, FDA proposes to transfer the existing definition to a new § 60.22(e) which would be applicable to animal drug products as well as food and color additives.

FDA also proposes in § 60.22 to redesignate existing paragraph (d) as new paragraph (f) to accommodate the proposed amendments discussed above. FDA further proposes to add a sentence to the end of new paragraph (f) to clarify the meaning of the term "regulatory review period" for animal drugs.

III. Economic Assessment

The agency has considered the economic impact of this rule and the relationship of its requirements to Public Law 100-670. The patent term restoration provisions in Public Law 100-670 will result in economic consequences for affected patent holders and their competitors.

The agency concludes, however, that this rule is not a "major rule" as defined by Executive Order 12291 and does not require a regulatory impact analysis. Similarly, the agency certifies that this rule will not have a significant economic impact on a substantial number of small entities, and therefore does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980 *(5 U.S.C. 601-611*, Pub. L. 96-354).

IV. Environmental Impact

The agency has determined that under 21 CFR 25.24(a)(8), this action is of a type that does not individually or cumulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

V. Paperwork Reduction Act of 1980

This proposed rule does not add any information collection requirements to 21 CFR part 60 although, pursuant to law, it does expand the scope of eligible products.

VI. Request for Comments

Interested persons may, on or before April 15, 1991, submit to the Dockets Management Branch (address above), written comments on this recommendation. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the name of the device and the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday though Friday.

List of Subjects in 21 CFR Part 60

Administrative practice and procedure, Drug, Food additives, Inventions and patents, Medical devices, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, the Drug Price Competition and Patent Term Restoration Act, and the Generic Animal Drug and Patent Term Restoration Act, it is proposed that 21 CFR part 60 be amended as follows:

PART 60 -- PATENT TERM RESTORATION

1. The authority citation for 21 CFR part 60 is revised to read as follows:

Authority: Secs. 409, 505, 507, 515, 520, 701, 706 of the Federal Food, Drug, and Cosmetic Act *(21 U.S.C. 348,* 355, 357, 360e, 360j, 371, 376); sec. 351 of the Public Health Service Act *(42 U.S.C. 262); 35 U.S.C. 156.*

2. Section 60.1 is amended in the introductory text of paragraph (a) by revising the second sentence to read as follows:

§ 60.1 Scope.

(a) * * * Patent term restoration is available for certain patents related to drug products (as defined in *35 U.S.C. 156*(f)(2)), and to medical devices, food additives, or color additives subject to regulation under the Federal Food, Drug, and Cosmetic Act or the Public Health Service Act. * * *

* * * * *

3. Section 60.3 is amended by revising the first sentence in paragraph (b)(2), the first sentence in paragraph (b)(5), and paragraphs (b)(11) (ii) and (iii), by adding new paragraph (b)(11) (iv), by revising paragraphs (b)(12) (ii) and (iii), by adding new paragraph (b)(12)(iv), by revising paragraph (b)(14), and by adding new paragraph (b)(16), to read as follows:

§ 60.3 Definitions.

* * * * *

(b) * * *

(2) Active ingredient means any component that is intended to furnish pharmacological activity or other direct effect in the diagnosis, cure, mitigation, treatment, or prevention of disease, or to affect the structure or any function of the body of man or of animals. * * *

* * * * *

(5) Clinical investigation or study means any experiment that involves a test article and one or more subjects and that is either subject to requirements for prior submission to the Food and Drug Administration under section 505(i), 507(d), 512(j), or 520(g) of the Federal Food, Drug, and Cosmetic Act, or is not subject to the requirements for prior submission to FDA under those sections of the Federal Food, Drug, and Cosmetic Act, but the results of which are intended to be submitted later to, or held for inspection by, FDA as part of an application for a research or marketing permit. * * *

* * * * *

(11) * * *

(ii) Section 515 of the Act (medical devices);

(iii) Section 409 or 706 of the Act (food and color additives); or

(iv) Section 512 of the Act (animal drug products).

(12) * * *

(ii) Medical devices submitted under section 515 of the Act;

(iii) Food and color additives submitted under section 409 or 706 of the Act; or

(iv) Animal drug products submitted under section 512 of the Act.

* * * * *

(14) Product means a human drug product, animal drug product, medical device, food additive, or color additive, as those terms are defined in this section.

* * * * *

(16) Animal drug product means the active ingredient of a new animal drug (as that term is used in the Act) that is not primarily manufactured using recombinant deoxyribonucleic acid (DNA), recombinant ribonucleic acid (RNA), hybidoma technology, or other processes involving site-specific genetic manipulation techniques, including any salt or ester of the active ingredient, as a single entity or in combination with another active ingredient.

3. Section 60.10 is revised to read as follows:

§ 60.10 FDA assistance on eligibility.

(a) Upon written request from PTO, FDA will assist PTO in determining whether a patent related to a product is eligible for patent term restoration as follows:

(1) Verifying whether the product was subject to a regulatory review period before its commercial marketing or use;

(2) For human drug products, food additives, color additives, and medical devices, determining whether the permission for commercial marketing or use of the product after the regulatory review period is the first permitted commercial marketing or use of the product either:

(i) Under the provision of law under which the regulatory review period occurred; or

(ii) Under the process claimed in the patent when the patent claims a method of manufacturing the product that primarily uses recombinant deoxyribonucleic acid (DNA) technology in the manufacture of the product;

(3) For animal drug products, determining whether the permission for commercial marketing or use of the product after the regulatory review period:

(i) Is the first permitted commercial marketing or use of the product; or

(ii) Is the first permitted commercial marketing or use of the product for administration to a food-producing animal, whichever is applicable, under the provision of law under which the regulatory review period occurred;

(4) Informing PTO whether the patent term restoration application was submitted within 60 days after the product was approved for marketing or use, or, if the product is an animal drug approved for use in a food-producing animal, verifying whether the application was filed within 60 days of the first approval for marketing or use in a food-producing animal; and

(5) Providing PTO with any other information relevant to PTO's determination of whether a patent related to a product is eligible for patent term restoration.

(b) FDA will notify PTO of its findings in writing, send a copy of this notification to the applicant, and file a copy of the notification in the docket established for the application in FDA's Dockets Management Branch (HFA-305), Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

4. Section 60.22 is amended by revising paragraph (b)(1), by redesignating existing paragraph (d) as paragraph (f), by adding new paragraphs (d) and (e), and by removing the period at the end of newly redesignated paragraph (f) and adding the following text to read as follows:

§ 60.22 Regulatory review period determinations.

* * * * *

(b) * * *

(1) The testing phase begins on the date a major health or environmental effects test is begun and ends on the date a petition relying on the test and requesting the issuance of a regulation for use of the additive under section 409 or 706 of the Act is initially submitted to FDA.

* * * * *

(d) For animal drugs:

(1) The testing phase begins on the date a major health or environmental effects test is begun or the date on which the agency acknowledges the filing of a notice of claimed investigational exemption for a new animal drug, whichever is earlier, and ends on the date a marketing application under section 512 of the Act is initially submitted to FDA.

(2) The approval phase begins on the date a marketing application under section 512 of the Act is initially submitted to FDA and ends on the date the application is approved.

(3) For purposes of this section, a "major health or environmental effects test" may be any test which:

(1) Is reasonably related to the evaluation of the product's health or environmental effects, or both;

(2) Produces data necessary for marketing approval; and

(3) Is conducted over a period of no less than 6 months duration, excluding time required to analyze or evaluated test results.

(f) * * *, or, in the case of a new animal drug in a Category II Type A medicated article, on the date of publication in the Federal Register of the notice of approval pursuant to section 512(i) of the Act. For purposes of this section, the regulatory review period for an animal drug shall mean either the regulatory review period relating to the drug's approval for use in nonfood-producing animals or the regulatory review period relating to the drug's approval for use in food-producing animals, whichever is applicable.

Dated: November 26, 1990.

James S. Benson,

Acting Commissioner of Food and Drugs.

Louis W. Sullivan,

Secretary of Health and Human Services.

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